State of Rhode Island and Providence Plantations

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Peter F. Kilmartin, Attorney General

VIA EMAIL ONLY

December 23, 2014
OM 14-40

Attorney Mark McBurney

Re: Clark v. West Glocester Fire District
(January 6, 2014)

Dear Mr. McBurney:

The investigation into your Open Meetings Act ("OMA") complaint filed on behalf of your client, Mr. Trevor Clark, against the West Glocester Fire District ("Fire District") is complete. By correspondence dated January 6, 2014, you allege the Fire District violated the OMA on 170 occasions. We address these allegations below.

At the outset, we note that in examining whether a violation of the OMA has occurred, we are mindful that our mandate is not to substitute this Department's independent judgment concerning whether an infraction has occurred or to examine the wisdom of a given statute, but instead, to interpret and enforce the OMA as the General Assembly has written these laws and as the Rhode Island Supreme Court has interpreted its provisions. Furthermore, our statutory mandate is limited to determining whether the Fire District violated the OMA. See R.I. Gen. Laws § 42-46-8. In other words, we do not write on a blank slate.

First, you claim that the Fire District violated the OMA on forty (40) occasions from 2004-2013[1] when it failed to post its open session minutes to the Secretary of State's website pursuant to R.I. Gen. Laws § 42-46-7(d). In a related allegation you also contend that the Fire District violated R.I. Gen. Laws § 42-46-7(b)(2) on over forty (40) occasions from 2004-2013 when it failed to post its open session minutes on the Secretary of State's website.

Rhode Island General Laws § 42-46-7(b) provides, in relevant part:

[1] The Fire District does not raise a statute of limitations or laches defense and in most, if not all, instances throughout this finding it appears a statute of limitations defense is not available to the Fire District. R.I. Gen. Laws § 42-46-8.

> "all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards, whether it is incorporated or not, and whether it is a paid department or not, shall post unofficial minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website." (Emphasis added).

It is notable that R.I. Gen. Laws § 42-46-7(b) was enacted into law on June 15, 2013, and became effective upon passage.

For its part, Rhode Island General Laws § 42-46-7(d) provides that:

> "[a]ll public bodies within the executive branch of state government and all state public and quasi-public boards, agencies and corporations, and those public bodies set forth in subdivision (b)(2), shall keep official and/or approved minutes of all meetings of the body and shall file a copy of the minutes of all open meetings with the secretary of state for inspection by the public within thirty-five (35) days of the meeting; provided that this subsection shall not apply to public bodies whose responsibilities are solely advisory in nature." (Emphasis added).

Our review is governed by two well-accepted cannons of statutory construction. First, we must follow the "cardinal rule" of statutory construction "that, if possible, every word, clause, and sentence of a statute must be given effect." Roberts v. City of Cranston Zoning Bd. of Review, 448 A.2d 779, 781 (R.I. 1982). Second, to the extent that two provisions of the same statute are in conflict, we must "construe them in a manner that attempts to harmonize them and that is consistent with their general objective scope." State v. Dearmas, 841 A.2d 659, 666 (R.I. 2004).

Here, we conclude that R.I. Gen. Laws § 42-46-7(b) and § 42-46-7(d) provide different statutory obligations. Specifically, R.I. Gen. Laws § 42-46-7(b), enacted into law on June 15, 2013, requires "all volunteer fire companies, associations, fire district companies, or any other organization currently engaged in the mission of extinguishing fires and preventing fire hazards," such as the Fire District, to post "unofficial minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier, on the secretary of state's website." (Emphasis added). In contrast, R.I. Gen. Laws § 42-46-7(d), which was amended effective June 15, 2013 to include "those public bodies set forth in subdivision (b)(2)," provides in pertinent part, that those entities within the purview of R.I. Gen. Laws § 42-46-7(d) "shall keep official and/or approved minutes of all meetings of the body and shall file a copy of the minutes of all open meetings with the secretary of state for inspection by the public within thirty-five (35) days of the meeting; provided that this subsection shall not apply to public bodies whose responsibilities are solely advisory in nature." (Emphasis added).

As indicated above, the import of the two above provisions, at least with respect to the Fire District, is that the Fire District must post "unofficial minutes of their meetings within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly

scheduled meeting, whichever is earlier," and the Fire District must also "keep official and/or approved minutes of all meetings of the body and shall file a copy of the minutes of all open meeting * * * within thirty-five (35) days of the meeting; provided that this subsection shall not apply to public bodies whose responsibilities are solely advisory in nature." R.I. Gen. Laws § 42-46-7(d). In both cases, the open session minutes – whether "unofficial minutes" or "official and/or approved minutes" – must be posted on the Secretary of State's website in the timeframe set forth above.

With respect to this allegation, eighty-one (81) of your eighty-seven (87) allegations concern meetings that occurred prior to June 15, 2013. Since neither R.I. Gen. Laws §§ 42-46-7(b)(2) nor (d) applied to the Fire District prior to the June 15, 2013 effective date, these eighty-one (81) allegations do not violate the OMA. Nonetheless, since the Fire District did convene meetings on July 23, 2013 and September 3, 2013, and since minutes (which appear to be unofficial) were not posted on the Secretary of State's website until September 19, 2013 and November 15, 2013, respectively, we conclude that the Fire District violated R.I. Gen. Laws § 42-46-7(d) on these two (2) occasions.

We also conclude that the Fire District violated R.I. Gen. Laws § 42-46-7(b)(2) when it posted "unofficial" minutes to the Secretary of State's website in an untimely manner for its meetings dated July 23, 2013, September 3, 2013, and November 19, 2013. Since R.I. Gen. Laws § 42-46-7(b)(2) required the Fire District to post "unofficial" minutes of its meetings on the Secretary of State's website within twenty-one (21) days of the meeting, but not later than seven (7) days prior to the next regularly scheduled meeting, whichever is earlier; and since the Fire District did not post unofficial minutes of its July 23, 2013, September 3, 2013, and November 19, 2013 meetings until September 19, 2013, November 15, 2013, and December 4, 2013, respectively, we find these three (3) occasions violated the OMA. With respect to your assertion that the Fire District also posted its minutes in an untimely manner for its November 5, 2013 meeting, we find no violation. Our review finds that the Fire District posted its unofficial minutes for this meeting on November 15, 2013, and such posting clearly occurred within "twenty-one (21) days of the meeting." Additionally, since the Fire District's next regularly scheduled meeting was scheduled (and took place) on December 3, 2013, the November 15, 2013 posting also occurred more than "seven (7) days prior to the next regularly scheduled meeting." We find no violation.

Next, you contend that the Fire District violated R.I. Gen. Laws § 42-46-6(b) by failing to post supplemental notice within forty-eight (48) hours for its meetings dated October 3, 2005, December 4, 2006, June 30, 2010 (10:00 am), June 30, 2010 (7:30 pm), and May 19, 2012. Notwithstanding any possible statute of limitations or laches argument, in none of these situations have you alleged or identified how Mr. Clark is aggrieved by these alleged violations.

The OMA provides that only "aggrieved" citizens may file a complaint with this Department. R.I. Gen. Laws § 42-46-8(a). In Graziano v. Rhode Island State Lottery Commission, 810 A.2d 215 (R.I. 2002), the Supreme Court examined the "aggrieved" provision of the OMA. In Graziano, an OMA lawsuit was filed concerning notice for the Lottery Commission's March 25, 1996 meeting wherein its Director, John Hawkins, was terminated. At the Lottery Commission's March 25, 1996 meeting, Mr. Hawkins and his attorney, Ms. Graziano, were both present. Finding that the Lottery Commission's notice was deficient, the trial justice determined that the

Lottery Commission violated the OMA, and an appeal ensued. On appeal, the Rhode Island Supreme Court found that it was "unnecessary" to address the merits of the OMA lawsuit because "the plaintiffs Graziano and Hawkins ha[d] no standing to raise this issue" since "both plaintiffs were present at the meeting and therefore were not aggrieved by any defect in the notice." Id. at 221. The Court continued that it:

> "has held on numerous occasions that actual appearance before a tribunal constitutes a waiver of the right of such person to object to a real or perceived defect in the notice of the meeting. * * * It is not unreasonable to require that the person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect. While attendance at the meeting would not prevent a showing of grievance or disadvantage, such as lack of preparation or ability to respond to the issue, no such contention has been set forth in the case at bar. The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice. Id. at 221-22. (Emphases added).

We have been presented no evidence concerning whether Mr. Clark attended the meetings in question, sought to attend the meetings in question, or did not attend the meetings in question because of the allegedly deficient notice. Accordingly, pursuant to Graziano, we find insufficient evidence to determine that Mr. Clark was aggrieved and find no violation. It is not lost upon this Department that this is not the first occasion that Mr. Clark has alleged a deficient public notice, yet has failed to allege or demonstrate standing. See Clark v. West Glocester Fire District, OM 14-35.

You also allege the Fire District violated the OMA with respect to various other meetings. We address these allegations below. In doing so, we observe that the OMA requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5." R.I. Gen. Laws § 42-46-3. Also, "all public bodies shall keep written minutes of all their meetings" and these minutes shall include, but need not be limited to "(1) [t]he date, time, and place of the meeting; (2) [t]he members of the public body recorded as either present or absent, (3) [a] record by individual members of any vote taken; and (4) [a]ny other information relevant to the business of the public body that any member of the public body requests be included or reflected in the minutes." R.I. Gen. Laws § 42-46-7(a).

A. June 4, 2013 Meeting

You contend that the Fire District violated the OMA when it discussed matters during its open session meeting that were not adequately advertised on its public notice, that the Fire District's minutes failed to indicate the "place of the meeting," and that the Fire District's minutes indicated that votes were taken, but fail to contain "[a] record by individual members of any vote taken." Id.

The OMA requires all public bodies provide supplemental notice of meetings at least 48 hours in advance of the meeting. See R.I. Gen. Laws § 42-46-6(b). "This notice shall include the date the notice was posted, the date, time and place of the meeting, and a statement specifying the nature of the business to be discussed." Id. (Emphasis added).

In Tanner v. Town Council of East Greenwich, 880 A.2d 784 (R.I. 2005), the Rhode Island Supreme Court considered the previously emphasized language and determined that an agenda item indicating "Interviews for Potential Boards and Commission Appointments" did not adequately apprise the public of the nature of the business to be discussed. Specifically, after conducting interviews as indicated on the notice, the East Greenwich Town Council proceeded to vote to appoint various individuals to the planning and zoning Boards for the Town. The Court found that, although the standard is "somewhat flexible," the contents of the notice "reasonably must describe the purpose of the meeting or the action proposed to be taken." Id. at 797-98. The Tanner Court added that "the Legislature intended to establish a flexible standard aimed at providing fair notice to the public under the circumstances, or such notice, based on the totality of the circumstances, as would fairly inform the public of the nature of the business to be discussed or acted upon." Id. at 796. Moreover, the Court declined to provide specific guidelines because "such an approach accounts for the range and assortment of meetings, votes, and actions covered under OMA, and the realities of local government, while also safeguarding the public's interest in knowing and observing the workings of its governmental bodies." Id. See also Anolik v. Zoning Board of Review of the City of Newport, 64 A.3d 1171 (R.I. 2013); Okwara v. Rhode Island Commission on the Deaf and Hard of Hearing, OM 00-07 (broad agenda items such as "old business" and "new business" violate the OMA).

Here, despite some concern over the sufficiency of the Fire District's June 4, 2013 agenda, we simply conclude that the absence of any evidence demonstrating that Mr. Clark was aggrieved by this allegation prevents our further review. See Graziano, 810 A.2d at 221-22. For all we know, Mr. Clark attended the June 4, 2013 meeting, or never had any intention of attending the June 4, 2013 meeting. In these scenarios, as well as likely other circumstances, Mr. Clark would not be aggrieved and the failure to demonstrate this threshold requirement is, respectfully, fatal to this claim. Indeed, our finding that Mr. Clark is aggrieved would require our speculation and we simply decline to engage in such an exercise. See id. ("The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice."). Nonetheless, we do conclude that the Fire District violated the OMA when its minutes failed to indicate the location where the meeting occurred, as well as a record by individual member of any votes taken. R.I. Gen. Laws § 42-46-7(a).

B. July 23, 2013 Meeting

You contend that the Fire District violated the OMA when the Fire District discussed matters during its July 23, 2013 meeting that were not properly noticed, including a "personnel" matter involving Mr. Clark in executive session; when the Fire District improperly convened into executive session for a "personnel" matter; when the Fire District failed to disclose votes taken in executive session; when the Fire District failed to articulate an open call; and when the Fire District failed to properly record its open session minutes.

Once again, on the record provided, we conclude that Mr. Clark has not demonstrated that he is "aggrieved" by the allegations that matters were discussed during the July 23, 2013 meeting that were allegedly not properly noticed. With respect to this conclusion, two points merit emphasizing. First, your complaint makes clear that, like Graziano, you complain about the

sufficiency of the Fire District's public notice. See Complaint, ¶ 92 ("The WGFD's notice/agenda for this meeting did not set out with sufficient specificity the multiple issues discussed"). Second, as discussed supra, "[t]he burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice." Graziano, 810 A.2d at 221-22. Although your complaint does indicate that "Trevor Clark had an interest in how this [personnel] issue was presented to, and dealt with, by the Board, yet was frustrated from doing so by the Board's willful omission of enough subject matter specificity in its agenda/notice," other portions of your complaint suggest that Mr. Clark had actual knowledge of the subject-matter to be discussed. Accordingly, on this record we conclude that your complaint fails to satisfy the Graziano standard. Again, we have been presented no evidence concerning whether Mr. Clark attended the meeting in question, sought to attend the meeting in question, or determined that he had no interest in attending the meeting in question based upon the allegedly deficient notice. See Clark, OM 14-35.

Next, you claim that the Fire District improperly convened into executive session and failed to articulate a proper open call. These allegations do not directly implicate Graziano and the concomitant requirement that a "person who raises the issue of the defect in notices be in some way disadvantaged or aggrieved by such defect," Graziano, 810 A.2d at 221-22, and as such, we proceed to the merits. In relevant part, the Fire District responds through Chairman William J. Flynn's affidavit, and relates:

> "[i]t is submitted that the purpose for convening into executive session was proper due to the personnel issue presented by the Complainant – Mr. Clark. It was Mr. Clark who raised the personnel issue and sought the Board's intervention concerning 'diversity training'. The Executive session minutes and Open meeting minutes posted on the SOS website correctly state the vote taken by the Board to respond to Mr. Clark's demands, in writing, to address his concerns."

The OMA requires that "[e]very meeting of all public bodies shall be open to the public unless closed pursuant to §§ 42-46-4 and 42-46-5." R.I. Gen. Laws § 42-46-3. "By open call, a public body may hold a meeting closed to the public upon an affirmative vote of the majority of its members. A meeting closed to the public shall be limited to matters allowed to be exempted from discussion at open meetings by § 42-46-5. The vote of each member on the question of holding a meeting closed to the public and the reason for holding a closed meeting, by a citation to a subdivision of § 42-46-5(a), and a statement specifying the nature of the business to be discussed, shall be recorded and entered into the minutes of the meeting." R.I. Gen. Laws § 42-46-4(a).

We conclude that the Fire District improperly convened into executive session. To explain no evidence has been presented that the Fire District articulated an open call (or recorded this open call in its open session minutes) as discussed in the OMA and as set forth above – vote of each member, statement specifying the nature of the business to be discussed, and citation of the subdivision of § 42-46-5(a). Our conclusion requires some discussion.

Specifically, having reviewed the Fire District's July 23, 2013 notice, open session minutes, and its response to your complaint, at no point does the Fire District articulate the subdivision of R.I.

Gen. Laws § 42-46-5(a) upon which it convened into executive session. To be sure, at various points – including in its open session minutes – the Fire District makes clear that it is convening into executive session to discuss "a personnel issue," but considering the Fire District never directs this Department (or the public) to the subdivision of R.I. Gen. Laws § 42-46-5(a) upon which the executive session was convened, we simply decline to speculate on the statutory basis of the executive session.[2] For this reason, we conclude that the Fire District improperly convened into executive session to discuss a "personnel" issue.[3] See R.I. Gen. Laws § 42-46-4(a)("No public body shall discuss in closed session any public matter which does not fall within the citations to § 42-46-5(a) referred to by the public body in voting to close the meeting, even if these discussions could otherwise be closed to the public under this chapter.").

You also contend that the Fire District failed to properly disclose certain votes, either in open session or in executive session. Specifically, you claim that the Fire District voted during its executive session, but failed to disclose the executive session vote. As discussed in Cosper v. Mental Health Advocate Search Committee, OM 13-01 and Clarke v. North Cumberland Fire District, OM 10-21, a public body may not circumvent the disclosure procedures by contending that a "vote" was not taken, but instead, only a "consensus" was reached. See R.I. Gen. Laws § 42-46-7(a)(3)(requiring minutes to contain a record by individual member of all votes). Despite this general rule, the distinction between a general discussion that leads to some further action – and that may not constitute a vote – versus a discussion that leads to a "consensus" – and that may constitute a vote – is sometimes more difficult to appropriately categorize. Although we acknowledge this application to be a close call in this situation, having reviewed the executive session minutes, we conclude that the Fire District did arrive at a consensus or a vote in executive session. Accordingly, the Fire District violated the OMA by failing to articulate that vote upon reconvening into open session. See R.I. Gen. Laws § 42-46-4(b)("All votes taken in closed sessions shall be disclosed once the session is reopened; provided, however, a vote taken in a closed session need not be disclosed for the period of time during which its disclosure would jeopardize any strategy negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a)."). The Fire District also violated the OMA when its open session minutes failed to "record by individual members of any vote taken." R.I. Gen. Laws § 42-46-7(a)(3). With respect to this matter, the open session minutes evince several occasions where a motion was made, seconded, and passed. While the identity of the members who made and seconded the motions are identified, the open session minutes do not "record by individual members of any vote taken." In this respect, the open session minutes are unclear whether the vote passed unanimously or by a 2-1 majority. You also claim that the Fire District violated the OMA by failing to record in the open session minutes the vote to seal the executive session

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[2] Even if we were to speculate that the executive session was convened pursuant to R.I. Gen. Laws § 42-46-5(a)(1), in order to properly convene into executive session the OMA would require the satisfaction of certain events and no attempt has been made to demonstrate to this Department that these conditions precedent have been satisfied.

[3] Under the appropriate circumstances, we do not rule out that a public body could discuss "personnel" type issues in executive session, but for the reasons discussed above, we need not reach this issue in this case.

minutes. Because our review finds that the executive session minutes have not been sealed – and in fact are posted on the Secretary of State's website – we find no violation.

C. September 3, 2013

According to your complaint, the Fire District violated the OMA when it:

> "discussed a subject ('Review of West Glocester Rules and Regulations updated for 2013') not mentioned in its posted agenda. * * * Trevor Clark had a demonstrable interest in how this issue was presented to, and dealt with, by the [Fire District] and the [Fire District] community, yet was frustrated from attending this meeting by the [Fire District's] concealment and willful omission of subject matter specificity in its agenda/notice." See Complaint, ¶ 105.

The Fire District responds that "[t]he notice posted on the SOS website provides the September 3, 2013 agenda." (Emphasis added).

Unlike the previous allegations concerning the specificity of the posted notice, your complaint alleges that based upon the Fire District's posted notice, Mr. Clark was "frustrated from attending this meeting," and that had he known that the Rules and Regulations would be discussed, he would have sought to attend the September 3, 2013 meeting. In our opinion, this satisfies the Graziano standard.

Having reached this conclusion, we find no evidence – and the Fire District makes no argument – that the Fire District's September 3, 2013 agenda provided a sufficient statement specifying the nature of the business to be discussed. See R.I. Gen. Laws § 42-46-6(b). Our prior review of Tanner and Anolik – as well as the Fire District's failure to address this issue – provide a sufficient basis to support our conclusion.

D. November 5, 2013 Meeting

You begin by taking issue with the specificity of the November 5, 2013 public notice, but as discussed for various other meetings, supra, the complaint contains no information to substantiate (or even allege) that Mr. Clark is aggrieved by this alleged notice violation. In its totality, you allege:

> "[t]he agenda for this meeting listed routine matters only ('Agenda will be approval of reports, approval and payment of bills and any other district business that comes before the body.')[.] Yet the minutes evince the Board considered no routine matters at all, violating § 42-46-6." See Complaint, ¶ 106.

Consistent with our discussion, supra, and in accordance with Graziano, we find no evidence that Mr. Clark satisfied his burden of demonstrating that he is aggrieved by this allegation. See Graziano, 810 A.2d at 221-22. Thus, we find no violation.

Additionally, you contend that the Fire District violated the OMA when it convened into executive session without providing an open call. The Fire District provides no response to this allegation, and in relevant part, its open session minutes provide in its entirety, "Board recessed into executive session at 7:50 PM for a personnel issue and will reconvene." For the same reasons discussed, supra, we conclude that the Fire District violated the OMA when it failed to articulate (and record in its open session minutes) an open call containing the subdivision of R.I. Gen. Laws § 42-46-5(a) upon which the executive session was convened, the vote of each member on the question of holding an executive session meeting, and a statement specifying the nature of the business to be discussed in executive session. See R.I. Gen. Laws § 42-46-4(a).

You also contend that the Fire District's open session minutes are deficient in several respects. Namely, you claim that the Fire District's open session minutes fail to identify the Fire District members as present/absent, the vote to seal the executive session minutes, and a record by individual member of all votes taken. Having reviewed the open session minutes, we conclude that the open session minutes fail to identify "[a] record by individual members of any vote taken" for the matters voted upon during this meeting, including sealing the executive session minutes.[4] See R.I. Gen. Laws § 42-46-7(a)(3). Although the open session minutes, in our opinion, could have more clearly identified "[t]he members of the public body recorded as either present or absent," our review of the open session minutes finds that three board members are listed as in "attendance," and the Fire District's affidavit makes clear that the Fire District is composed of three (3) board members. R.I. Gen. Laws § 42-46-7(a)(2). We find no violation.

E. November 19, 2013 Meeting

As background, at the Fire District's November 19, 2013 meeting, the Fire District convened to discuss suspending and/or terminating Mr. Clark. According to your complaint, the Fire District convened three (3) executive sessions: "the first Executive Session (from which Mr. Clark was excluded) to hear from complainants against Mr. Clark, the second Executive Session to hear Mr. Clark's rebuttal of allegations presented to him by the Board, and the third Executive Session was for the deliberation of Board members to determine whether or not to terminate Mr. Clark."

In relevant part, Chairman Flynn responds that:

> "[t]here was only one Executive Session held by the Board during that meeting. The Board never left executive session. It was presented with evidence, both verbal and written, by Chief LaButti, of charges against Mr. Clark * * * . The Board received live witness testimony from those Fire Department members that had made allegations against Mr. Clark. After receiving such testimony and evidence, the Board dismissed the witnesses and Mr. Clark was invited into the Executive Session to discuss the allegations and elected to attempt to read a

[4] In the Fire District's affidavit, Chairman Flynn indicates that "[t]he Board, by unanimous decision, convened into executive session[.]" While we have no reason to doubt this assertion, this "unanimous" vote is not evidenced in the open session minutes. See R.I. Gen. Laws § 42-46-7(a)(3).

written statement to the board while, without the Board's permission or acknowledgment, tape the proceedings.

* * *

It is important to note, in addressing the allegations of Mr. Clark that he was not informed of the purpose of the Special Meeting or that he may elect to have such discussion in open session, Mr. Clark was given notice by the District's counsel, at the direction of the Board, by correspondence dated November 7, 2013 to Mr. Clark's attorney who had contacted Chief LaButti by previous correspondence dated November 1, 2013. Since Mr. Clark was represented by counsel as of November 1, 2013, the Board believed it prudent to respect the attorney-client relationship and provide notice of the purpose of the Special Meeting through his appointed agent; Mark McBurney, Esq."

Additional facts and arguments regarding the allegations associated with this meeting will be set forth as necessary.[5]

Here, you set forth much of the same allegations as previously asserted. Specifically, you contend that the Fire District did not articulate an open call and that its open session minutes are insufficient. While you allege that the Fire District convened three (3) separate executive sessions – and therefore violated various "open call" provisions on three (3) separate occasions – based upon the evidence presented we find that the Fire District convened one (1) executive session. In support of this conclusion, we observe the open session minutes evidence that the Fire District convened into executive session on only one occasion. Moreover, even as you allege that three (3) separate executive sessions were convened, it is undisputed that the subject matter of what you claim to be three (3) separate executive sessions, concerned the same topic.

With respect to your open call allegations, we conclude that the Fire District violated the OMA when it failed to articulate (and record in its open session minutes) an open call containing the subdivision of R.I. Gen. Laws § 42-46-5(a) upon which the executive session was convened, the vote of each member on the question of holding an executive session meeting, and a statement specifying the nature of the business to be discussed in executive session. See R.I. Gen. Laws § 42-46-4(a).

Similar to the above allegations, you also contend that the Fire District's open session minutes are deficient in several respects. Namely, you claim that the Fire District's open session minutes fail to identify the Fire District members as present/absent, the vote to seal the executive session minutes, and a record by individual member of all votes taken. Having reviewed the open session minutes, we conclude that the open session minutes fail to identify "[a] record by individual members of any vote taken" for the matters voted upon during this meeting, including sealing the executive session minutes. See R.I. Gen. Laws § 42-46-7(a)(3). Although the open session minutes, in our opinion, could have more clearly identified "[t]he members of the public body recorded as either present or absent," our review of the open session minutes finds that

[5] Our focus is entirely on the OMA and we make no conclusions concerning whether Mr. Clark was afforded his due process or any other rights afforded to him.

three board members are listed as "present," and the Fire District's affidavit makes clear that the Fire District is composed of three (3) board members. R.I. Gen. Laws § 42-46-7(a)(2). We find no violation.

You also claim that the Fire District violated the OMA when it took a "voice vote" to seal the executive session minutes when a "recorded" vote is required, that public bodies may not vote to seal executive session minutes "beforehand,' and that the Fire District did not take a vote to seal the executive session minutes in open session. While the OMA clearly requires that a public body's minutes contain "[a] record of individual members of any vote taken," R.I. Gen. Laws § 42-46-7(a)(3), the mere taking of a "voice vote" does not violate the OMA. Indeed, the taking of a vote by voice – and then recording the vote as required by the OMA – is commonplace. We also find that the Fire District did not violate the OMA by sealing the executive session minutes "beforehand" nor do we find that the Fire District violated the OMA when it sealed the executive session minutes in executive session. Respectfully, you provide no authority to support either contention. See MacDougall v. Quonochontaug Central Beach Fire District, OM 13-24 ("All executive session minutes discussed in this finding clearly evince that the Board of Governors voted to seal the executive session minutes in executive session and the OMA does not specify whether executive session minutes should be sealed in open session or in executive session."). Accordingly, we find no violations.[6]

You also raise allegations specific to Mr. Clark, namely that the Fire District failed to provide Mr. Clark advanced written notice advising him that he may require the November 19, 2013 executive session to be held in open session and that the Fire District violated the OMA by failing to state and record in its open session minutes that Mr. Clark was provided notice. On the record presented, we are unable to find a violation and explain below.

While we have various concerns with your complaint on this issue,[7] for our immediate purposes it is noteworthy that by letter dated February 4, 2014, this Department acknowledged your

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[6] You also contend that the open session minutes indicate that vote(s) were taken in executive session, yet not disclosed upon reconvening into open session. The Fire District does not address this allegation in its response and the open session minutes do suggest that the Fire District did take a vote or otherwise come to a consensus in executive session. See November 19, 2013 open session minutes ("Trevor Clark was informed [] that the Board would respond to him in writing with its decision."). Considering the Fire District's lack of response, we find it violated the OMA by not disclosing the executive session vote upon reconvening into open session See R.I. Gen. Laws § 42-46-4(b)("All votes taken in closed sessions shall be disclosed once the session is reopened; provided, however, a vote taken in a closed session need not be disclosed for the period of time during which its disclosure would jeopardize any strategy negotiation or investigation undertaken pursuant to discussions conducted under § 42-46-5(a).").

[7] For example, you contend that the Fire District violated the OMA when it, among other things, failed to provide Mr. Clark actual notice of his right to have the executive session held in open session. The record is unclear concerning the subdivision of R.I. Gen. Laws § 42-46-5(a) upon which the Fire District convened into executive session and your complaint fails to definitively allege that the Fire District convened into executive session (and therefore failed to provide notice) pursuant to R.I. Gen. Laws § 42-46-5(a)(1). Specifically, you contend that "[t]he WGFD

complaint and, with respect to this issue, we cited Graziano and asked that you "provide evidence as to how Mr. Clark was aggrieved by [the] lack of notice." We received no response and for this reason, on the record provided and for the reasons discussed above, we reject your claim. See Graziano, 810 A.2d at 221-22 ("The burden of demonstrating such a grievance is upon the party who seeks to establish standing to object to the notice."). Accordingly, we find no violation.

Lastly, with respect to this meeting, you claim that the Fire District violated the OMA when Mr. Clark, as a resident and member of the Fire District, asked that a document be made part of the minutes, which the Fire District declined to do. While we have been presented with some conflicting factual evidence concerning whether the requested document was (or was not) made part of the minutes, this factual discrepancy is of little moment because the OMA imposes no such requirement on the Fire District to include in its minutes a document requested by one of its employees. See R.I. Gen. Laws § 42-46-7(a)(4)("Any other information relevant to the business of the public body that any member of the public body requests be included or reflected in the minutes"). Accordingly, we find no violation.

F. Various Other Meetings

You claim the Fire District violated the OMA during various other meetings occurring from 2004 through 2013. For instance, you contend that the Fire District violated the OMA during the Fire District's annual meetings on June 15, 2013; August 7, 2004; and August 2, 2008; but the Rhode Island Supreme Court has made clear that the OMA does not apply to these types of annual/financial meetings. See Pine v. McGreavy, 687 A.2d 1244 (R.I. 1997). Accordingly, these allegations do not violate the OMA. On other occasions, you contend that the Fire District's posted notice was insufficient for its meetings dated January 4, 2005; October 3, 2005; October 1, 2007; and March 30, 2011. But, as discussed, supra, your complaint contains no allegations or evidence that Mr. Clark was aggrieved by these alleged violations, and therefore pursuant to Graziano, we also find no violation. See Graziano, 810 A.2d at 221-22.

Lastly, you allege that the Fire District's open session minutes were insufficient. Specifically, you claim that the Fire District's October 3, 2005 minutes incorrectly indicated that the meeting occurred on October 4, 2005; that the October 1, 2007 minutes incorrectly indicated that the meeting occurred on October 2, 2007, failed to indicate the members absent or present, and failed to contain a record by individual member of votes taken; and that the Fire District's March 30, 2011 minutes incorrectly indicated the date the meeting was held as well as failed to indicate

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did not provide, and Trevor Clark did not receive, advanced written notice advising him that the WGFD may require the meeting to be held in open session." See Complaint, ¶ 149. Significantly, the foregoing allegation merely references "§ 42-46-5(a)." In the following paragraph you contend that "[b]efore going into this first closed Executive Session meeting, the WGFD failed to state for the record that Trevor Clark was duly notified of the meeting, or that it may be held in open session." See Complaint, ¶ 150. With respect to this allegation you reference "§ 42-46-5-1; § 42-46-5-4," which we assume to reference R.I. Gen. Laws §§ 42-46-5(a)(1) and (a)(4). While actual personal notice may be required in situations implicated by R.I. Gen. Laws § 42-46-5(a)(1), actual personal notice is not required in situations implicated by R.I. Gen. Laws § 42-46-5(a)(4).

the location of the meeting. It is significant that the Fire District raises no issue that these allegations fall outside the statute of limitations (or any other defense) and that all the matters raised are required by the OMA to be included in a public body's minutes. See R.I. Gen. Laws § 42-46-7(a). Having reviewed the above referenced open session minutes, we find that the Fire District violated the OMA with respect to these allegations.

Upon a finding that a complaint brought pursuant to the OMA is meritorious, the Attorney General may initiate suit in the Superior Court. R.I. Gen. Laws § 42-46-8(a). There are two remedies in suits filed under the OMA: (1) "[t]he court may issue injunctive relief and declare null and void any actions of a public body found to be in violation of [the OMA];" or (2) "[t]he court may impose a civil fine not exceeding five thousand ($5,000) dollars against a public body or any of its members found to have committed a willful or knowing violation of [the OMA]." R.I. Gen. Laws § 42-46-8(d).

In this case, we find neither remedy to be appropriate at this time. Specifically, there is simply insufficient evidence of a willful or knowing violation. We do, however, conclude that some injunctive relief may be appropriate, but will allow the Fire District an opportunity to remedy these violations, where appropriate, on its own. The Fire District should do so within thirty (30) business days from the date of this finding and should advise this Department within ten (10) business days of this finding of its intentions. Specifically, the Fire District must post to the Secretary of State's Office website "official and/or approved minutes" for its meetings dated July 23, 2013 and September 13, 2013. See R.I. Gen. Laws § 42-46-7(d). Additionally, with respect to the Fire District's minutes, the Fire District is directed to amend its minutes to remedy and/or include those matters that are set forth in R.I. Gen. Laws § 42-46-7(a), but which we concluded were either omitted or incorrectly recorded, namely the date, location, and the names of members absent/present, as well as a recording by individual member of any votes taken in open session or in executive session. See R.I. Gen. Laws § 42-46-7(a). With respect to the recording of individual votes, "[t]his Department has found that when the vote is unanimous, it sufficiently informs the public of the 'record by individual members of any vote taken' to indicate that all present members voted unanimously." See DesMarais v. Manville Fire Department, OM 12-09. See also Leeson v. Narragansett Town Council, OM 06-28. We stress that we do not view the amendment of minutes as an opportunity to recreate events that did not occur, such as an open call (statement of the nature of business to be discussed in executive session and subdivision of OMA exemption), and accordingly, the amendment of minutes should be limited to events that did occur, but that were not properly recorded.

The remaining violations found herein, we determine injunctive relief is not appropriate. For instance, the unofficial minutes required to be posted pursuant to R.I. Gen. Laws § 42-46-7(b) have already been posted to the Secretary of State's website, and although we found the July 23, 2013 executive session to be improper, injunctive relief would not be appropriate and the executive session minutes to this meeting have already been made publicly available. Lastly, although we found that the Fire District provided insufficient public notice that it would discuss "Rules and Regulations" during its September 3, 2013 meeting, our review finds that the Fire District took no action during this open session meeting that could be declared null and void.

Although the Attorney General will not file suit in this matter, nothing in the OMA precludes an individual from pursuing an OMA complaint in the Superior Court. The complainant may do so within ninety (90) days from the date of the Attorney General's closing of the complaint or within one hundred eighty (180) days of the alleged violation, whichever occurs later. R.I. Gen. Laws § 42-46-8. The Fire District is advised that the actions discussed herein violate the OMA and may serve as evidence of a willful or knowing violation in a future similar situation. Please be advised that we are closing our file as of the date of this letter.

We thank you for your interest in keeping government open and accountable to the public.

Very truly yours,

Michael W. Field
Assistant Attorney General

Cc: Daniel J. Archetto, Esq.
Vicki Bejma, Esq.